No. 73

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

FIRST SECURITY BANK OF UTAH, N.A., *Petitioner*

v.

COMMERCIAL SECURITY BANK, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER, FIRST SECURITY BANK OF UTAH, N.A.

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It is beyond peradventure that the various state laws governing state banks differ not only from one another but also from the National Bank Act. All parties to this proceeding must agree, therefore, that there is no over-all "policy of equalization", despite the frequent use of that phrase by Respondent. Had Congress wished to establish a "policy of equalization",

it could have done so simply by enacting a statute making national banks subject to the State laws governing State banks in the particular State in which the national bank was located. Congress, however, did not do this. National banks are subject to the laws of the United States, and are not subject to the laws of the State, except in so far as Congress has expressly provided. *Van Reed* v. *People's National Bank,* 198 U.S. 554, 557 (1905); *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 558-559 (1963).

Respondent christens the area dealing with branch banking "a basic competitive area", and states that in *this* area, there must be exact equality between state and national banks because of its "basicness". Many pages of Respondent's brief are devoted to this thesis, and much legislative history is quoted. The unquestionable fact remains, however, that in this case, unless Congress expressly provided that the laws of the State of Utah dealing with the method of establishing a branch of a State bank shall also control the method whereby national banks may establish a branch, the action of the Comptroller in authorizing a branch to Petitioner was proper, and the judgment of the Court below should be reversed.

The words of 12 U.S.C. 36(c)(1), the governing statute, are clear and unambiguous. That Section provides that a national bank may, with the Comptroller's approval, establish a branch within the limits of the city in which it is situated, if such establishment is at the time expressly authorized to State banks by the laws of the State in question. As Judge Christenson found in *Walker Bank & Trust Co.* v. *James J. Saxon and the First National Bank of Logan,* 234 F. Supp. 74, 77,

the other case which accompanies the instant one to this Court, branches *are* expressly authorized to State banks by Utah law under the circumstances of the present case. No one really takes issue with the fact that both Respondent, a State bank, and Petitioner, a national bank, are authorized to establish branches in Ogden, Utah. The crux of the case is whether Petitioner is bound by the condition of "acquisition" placed upon State banks by a State statute. No federal statute states that this State limitation on the method of establishing a branch shall apply to national banks, and no one even suggests that other State conditions, such as those dealing with capitalization and other requirements, apply to national banks,[1] but Respondent terms the matter of branches, "a basic competitive area", and states, therefore and *ipse dixit,* that the Utah limitation on method must be read into federal law.

To support its position, Respondent begins by taking the phrase, "policy of equalization", from the case of *Lewis* v. *Fidelity & Deposit Co.,* 292 U.S. 559 (1934) (cited in Respondent's brief on pages 8, 14, 17, 33, 34 and 40) and attempting to establish it as a concept of law controlling in this case. The *Lewis* case involved a federal statute enacted in 1930, dealing with the security which could be given for public monies deposited in banks and not pertinent to the instant case. In fact, the 1930 Act provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited *of the same kind as is authorized by the law of the State in which such association is located* in the case of

[1] See opinion of Judge Christenson at 234 F. Supp. 78, f.n. 8.

other banking institutions in the State." (Emphasis added)

The language emphasized is of the broad type *not present* in the instant case. When, in some *dicta* in the *Lewis* case, the Court speaks of a "policy of equalization" in connection with federal bank branching, it should be remembered that the "equalization" extends no farther than Congress provided, and Congress nowhere provided that it should extend to the point where a State can impose limitations of method on the way a national bank may establish a branch.

In its brief, Respondent also turns to *Commercial State Bank of Roseville* v. *Gidney,* 174 F. Supp. 770, *aff'd per curiam,* 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960). In addition to the fact that the *Gidney* case involved a different issue completely, and a different section of the statute, it also appears that the arguments presented in the istant case were not presented to the Court in *Gidney.* This is understandable since the overriding issue in the *Gidney* case was the question of what constituted a "village", and the question of the limitation of method of establishing a branch of a national bank was not even before the Court.

Respondent also relies for support on the recent case of *Jackson* v. *First Nat'l Bank of Valdosta,* 349 F. 2d 71 (5th Cir. 1965). The issue in that case, also, was not the issue in the instant case. In the *Jackson* case, a State Superintendent of Banks sought a declaration that a national bank could not lawfully open a drive-in banking facility 281 feet away from its main office, and separated from that office by an alley and several buildings which were not owned by the Bank. The Comptroller of the Currency felt that his approval to open

the drive-in window was not necessary since, in his view, the drive-in window was not a branch at all, but was an extension facility of the main office. The Court found against the national bank, holding that the national bank was bound by State law in this respect, and a State bank could not open such a drive-in window. The *Jackson* holding would be applicable in the instant case only if a State bank located in Ogden could not establish a branch. This, however, is not the case. In fact, State banks can establish branches in Ogden.

National Bank of Detroit v. *Wayne Oakland Bank,* 252 F. 2d 537 (6th Cir., 1958), cited at pages 9, 34 and 45 of Respondent's brief, is even less applicable than *Gidney* or *Jackson.* The crucial element in the *Wayne Oakland* case was neither "location" nor "method", but "time". At the time the National Bank of Detroit wanted to open a branch in Troy, Michigan, no State bank could establish a branch there under any circumstances. Since this was so, the Court held that neither could a national bank do so. The national bank had maintained that it had a right to establish a branch in Troy because a State bank had previously done so. The Court, however, cited 12 U.S.C. § 36, that a national bank may establish a branch, "* * * at any point within the State in which said [bank] is situated, if such establishment and operation are *at the time* authorized to State banks, et cet." (252 F. 2d at 540, emphasis, the Court's).

Suburban Trust Co. v. *National Bank of Westfield,* 222 F. Supp. 269 (D.N.J. 1963) is cited at pages 9 and 35 of Respondent's brief. This case relies upon the *Gidney* and *Wayne Oakland* cases, and, as we have seen those cases involved issues different from those present

in the instant case. The *Suburban Trust Co.* case also involved outside branches and 12 U.S.C. § 36(c)(2). In the *Suburban Trust Co.* case, the court, commenting on a provision of the pertinent New Jersey statute, said:

> "That limitation constitutes a *'restriction as to location'* within the meaning of 12 U.S.C. § 36(c) and is therefore incorporated in Section 36(c) and made applicable to * * * [the National bank seeking a branch]." (Emphasis added)

The case, therefore, went off on the legitimate issue of location, not whether or not New Jersey law could also prescribe the method by which the national bank branch could be established

South Dakota v. *National Bank of South Dakota,* 219 F. Supp. 842 (D.S.D. 1963), aff'd 335 F. 2d 444 (8th Cir., 1964), *cert. den.* 379 U.S. 970 (1965), cited at pages 9 and 35 of Respondent's brief, also relied upon the *Wayne Oakland* case. In *South Dakota* at page 446 of 335 F. 2d the court said:

> "12 U.S.C.A. § 36(c), so far as here material, authorizes national banks to establish branches in states where statutes specifically grant state banks power to operate branches subject to all restrictions on *location* imposed upon state banks by state law." (Emphasis added)

Again, the court recognized that the so-called "policy of equalization" referred to *location.* No mention was made of "method" or of "means".

Another of the cases relied upon by Respondent in its brief is *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.,* 116 U.S. App.

D.C. 285, 323 F. 2d 290 (1963), rev'd, 379 U.S. 411 1965). This case is cited by Respondent in connection with the arguments over standing and the weight to be given an administrative interpretation of the Comptroller of the Currency. It is interesting to note, however, that in the opinion of this Court reversing the Court of Appeals, the geographical nature of the limitation on the Comptroller was recognized when the Court said:

> "La. Rev. Stat. § 6:54 (1950) prohibits banks from opening branch offices in parishes other than their home parish, and these *geographical limitations* are made applicable to national banks by the Banking Act of 1933, 12 U.S.C. § 36(c)(2) (1958 ed.)." (Emphasis added) 379 U.S. 411, 13 L. Ed. 2nd, 386, 390, f.n. 1.

CONCLUSION

Despite the impressive volume of cases cited in the brief of Respondent, the fact remains that, under the clear wording of the statute, the Comptroller acted properly in authorizing a branch to Petitioner because the establishment and operation of branches in Ogden by Utah State banks were and are expressly authorized to State banks by Utah Code Annotated, 1953, Sec. 7-3-6. Nowhere does the law state that the Comptroller, in addition to the requirements of that statute, may also not authorize the establishment of a branch unless it is established through the same method or means by which a State branch is established. Respondent is asking the Court to read this additional limitation on the Comptroller into 12 U.S.C. § 36(c). Respondent respectfully submits, however, that if national bank branches are to be further limited, and new conditions as to method added to the existing conditions concern-

ing location, it is the Congress, and not the courts, which should effect this change.

Respectfully submitted,

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